

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 50

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RUSSELL F. MIZELL, III

Appeal No. 2005-0504
Application No. 08/654,600

MAILED

MAR 16 2005

U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

ON BRIEF

Before MCQUADE, NASE, and BAHR, Administrative Patent Judges.

MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Russell F. Mizell, III appeals from the final rejection of claims 3 through 13, all of the claims pending in the application.¹

This is the second appeal to this Board involving the instant application. A decision in the first appeal (Appeal No. 2000-0300) in favor of the appellant issued on July 24, 2001 (Paper No. 31). The claims at issue in the instant appeal are narrower in scope than those in the earlier appeal.

¹ Claim 13 has been amended subsequent to final rejection.

THE INVENTION

The invention relates to an apparatus for capturing stinkbugs. Representative claim 13 reads as follows:²

13. An apparatus for capturing stinkbugs consisting essentially of:

a bottom portion for attracting the target insect species and for directing said target insect species toward and into a top portion for the capture thereof;

said bottom portion comprising at least a first and a second fin, said first fin being disposed in a first substantially vertical plane and said second fin being disposed in a second substantially vertical plane, said first and second fins extending radially outwardly from a common longitudinal axis defined by a line of intersection of said first and second substantially vertical planes;

a surface of said first fin and a surface of said second fin defining opposing channel surfaces of an outwardly facing channel, said channel surfaces having portions which are directly exposed to an environment in which said target species is present, whereby said directly exposed portions may be seen by members of said stink bugs from positions beyond a perimeter of said apparatus;

each of said first and second fins being wider at a base portion thereof and narrow at a top portion thereof, whereby said channel defined by said surfaces of said first and second fins narrows from said wider base portions to said narrower top portions; said bottom portion being predominantly of a color which reflects light having a wavelength which attracts said stink bugs;

said top portion of said apparatus comprising a receptacle, said receptacle being open only at an entrance opening, and wherein said entrance opening is sufficiently large to permit entry of said stink bugs into said receptacle and is positioned

² In the event of further prosecution, the following informalities in the claims should be corrected: the terms "said planar fins" in claim 5 and "said chamber" in claim 11 lack a proper antecedent basis, and the subject matter recited in claim 11 is redundant with respect to that recited in parent claim 13.

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at, and substantially surrounds, an upper part of said bottom portion, whereby said channel formed by said first and said second fins terminates within said receptacle;

said top portion of said apparatus comprising a material of construction which admits ambient exterior light into the interior of said receptacle and onto said channel surface.

THE EVIDENCE

The item relied on by the examiner as evidence of obviousness is:

Tedders, W. L. and Wood, B. W., "A New Technique for Monitoring Pecan Weevil Emergence (Coleoptera: Curculionidae)," J. Entomol. Sci., Vol. 29, No. 1, pp. 18-30 (1994) (Tedders).

The item relied on by the appellant as evidence of non-obviousness is:

The 37 CFR § 1.132 Declaration of Dr. Russell F. Mizell (the appellant) filed April 2, 2002 (Paper No. 35).

THE REJECTION

Claims 3 through 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Tedders.

Attention is directed to the main and reply briefs (Paper Nos. 42 and 44) and the final rejection and answer (Paper Nos. 37 and 43) for the respective positions of the appellant and the examiner regarding the merits of this rejection.³

³ The references in the final rejection to claim 2 as a rejected claim are mistaken as claim 2 had been previously canceled via the paper filed on February 12, 1999 (Paper No. 20). Also, claims 3 through 13 stood additionally rejected in the

DISCUSSION

The Tedders article pertains to traps for monitoring the pecan weevil, a known pest which damages pecan trees. The article describes a series of tests designed to evaluate the hypothesis that a large majority (84%) of newly emerged adult pecan weevils fly or crawl to the relatively dark colored main stem of the pecan tree due to a natural visual attraction to the poorly reflective surface of the tree trunk (see page 19). The following passage relating to one of the tests (Test 1) fairly illustrates the basic nature of the Tedders traps:

. . . we tested the hypothesis by comparing weevil traps having large bases that were painted with a highly reflective color against traps of the same type painted with a poorly reflective color. The base of each trap was constructed from 0.95 cm thick exterior plywood and consisted of two triangular pieces, each measuring 55 cm wide base x 122 cm vertical height. One triangular piece was partially bisected with a 1.0 cm wide vertical saw-cut from the apex to one-half way to the base. The second piece was partially bisected with a 1.0 cm vertical cut from the center of the base to one-half way to the apex. The two triangular pieces were then interlocked utilizing the two vertical cuts to form a free-standing pyramidal trap base which served as the main attractant to the weevils.

final rejection under 35 U.S.C. § 112, second paragraph, as being indefinite. As this rejection is not restated in the answer, we assume that it has been withdrawn by the examiner (see Ex parte Emm, 118 USPQ 180, 181 (Bd. App. 1957)), presumably as a result of the amendment of claim 13 subsequent to final rejection.

To collect weevils crawling up the base, a trap . . . was constructed from a 11.5 cm diam. x 20.0 cm deep screen wire inverted funnel having a 0.79-cm opening at the apex and from a 2-l cylindrical plastic container. The screen funnel was nestled into and fixed to the mouth of the plastic container to form the trap. The trap, with funnel side down, was then placed on top of the pyramidal base so that weevils entering the screen funnel from below would crawl through the funnel and into the container and become trapped. Ten such traps were constructed. Differential reflectance was achieved by painting five trap bases with flat white . . . and five with flat dark brown Traps in all tests were anchored to the ground with two large gutter nails, each attached to a hook through a hole on each side of a single panel of the trap base [page 19].

The results of the tests seemingly support the hypothesis that newly emerged adult pecan weevils are attracted to the relatively dark color of the pecan tree trunk:

[p]ecan weevil adults at time of emergence from the soil were attracted to dark-colored traps in significantly larger numbers compared to those attracted to light-colored traps. Dark-colored traps adjacent to whitewashed tree trunks also significantly increased weevil capture compared to traps adjacent to natural trees, providing a good method for monitoring the emergence of weevils. . . . These behavioral responses may be that weevils visually perceive dark traps as tree trunks and whitewashed tree trunks are not recognized as such [page 28].

Tedders also lists a number of other species of arthropods collected by the brown and white traps during testing (see page 29). This list does not include stinkbugs.

The apparatus recited in independent claim 13 has much in common with the traps disclosed by Tedders. As correctly pointed out by the appellant, however, the claimed apparatus is for capturing stinkbugs rather than pecan weevils. To this end, claim 13 requires the bottom portion of the recited apparatus to be "predominantly of a color which reflects light having a wavelength which attracts said stink bugs." The underlying disclosure indicates that the color is yellow (see page 13 in the specification and Figure 4 in the drawings). Implicitly conceding that Tedders does not meet this limitation, the examiner submits that "[i]t would have been obvious to use routine experimentation to determine the optimum colors and the reflectance of these colors" (final rejection, page 4) and that "one skilled in the art would color the trap to bring in or attract the target species" (answer, page 4).

In essence, the examiner's position here amounts to a conclusion that it would have been obvious to provide the traps disclosed by Tedders with a bottom portion predominantly of a color which reflects light having a wavelength which attracts stink bugs. The evidentiary showing advanced by the examiner, however, does not justify such a conclusion. In this regard,

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Tedders does not teach or suggest (1) that the white and brown colors of the trap bases disclosed therein reflect light having a wavelength which attracts stinkbugs, or (2) that there exists another color, or indeed any color, which reflects light having a wavelength which attracts stinkbugs. Hence, Tedders fails to furnish the factual basis necessary to establish a prima facie case of obviousness with respect to the subject matter recited in independent claim 13 and dependent claims 3 through 12.⁴

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claims 3 through 13 as being unpatentable over Tedders.

SUMMARY

The decision of the examiner to reject claims 3 through 13 is reversed.

⁴This being so, it is unnecessary to delve into the merits of the appellant's declaration evidence of non-obviousness.

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REVERSED

John P. McQuade
JOHN P. MCQUADE
Administrative Patent Judge


JEFFREY V. NASE
Administrative Patent Judge


JENNIFER D. BAHR
Administrative Patent Judge

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